Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

MATTHEW J. RYAN; ROBERT C. JUBELIRER;
JESS M. STAIRS AND JAMES J. RHOADES,

Petitioners,

v.

DAVID POWELL, et al.

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an order compelling discovery from parties who are state legislators and whose objection to the discovery rests on legislative immunity is immediately appealable as a collateral order.

2. Whether state officials who intervene in an action that has the potential to affect the performance of their official duties are protected from certain discovery by the privilege that arises from legislative immunity.

LIST OF PARTIES

Petitioners are members of and leaders in the General Assembly of the Commonwealth of Pennsylvania: Matthew J. Ryan, Speaker of the House of Representatives; Robert C. Jubelirer, President *pro tempore* of the Senate; Jess M. Stairs, Chairman of the Education Committee of the House of Representatives and James J. Rhoades, Chairman of the Education Committee of the Senate ("Legislative Leaders"). They intervened in the district court in support of defendants and were appellants in the Court of Appeals.

Respondents, who are plaintiffs in the district court and were appellees in the Court of Appeals, are the City of Philadelphia and its Mayor; the School District of Philadelphia, its Superintendent, its Board of Education and the President of the Board; David Powell; Shelean Parks; Patrice Everage; Julia A. Davis; Yvette Bland; Geraldine Newton; Maria M. Rivera; Mary E. Miller; Gregory Luzak; Catherine Luzak; Fu Zhen Xie; The Black Clergy of Philadelphia and Vicinity; Philadelphia Branch NAACP; ASPIRA, Inc., of Pennsylvania; Parents Union for Public Schools; Citizens Committee On Public Education In Philadelphia; and Parents United for Better Schools, Inc.

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Petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit in *Powell et al. v. Ridge*, No. 00-1711 (April 6, 2001) (Appendix A), is published at 247 F.3d 520, 2001 U.S. App. LEXIS 6022. The order of the United States District Court for the Eastern District of Pennsylvania is not reported (Appendix B).

JURISDICTION

This petition is filed within 90 days after the Court of Appeals, following consideration of a petition for rehearing *en banc*, entered its judgment on May 4, 2001 (Appendix C). This Court has jurisdiction under 28 U.S.C. §1254(1). The constitutionality of a statute is not at issue.

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions directly involved in this matter. To the extent that the Third Circuit decision rejects characterization of the order at issue as a collateral order, and alters the right of intervening parties to assert privileges that they may otherwise hold in discovery, the matter tangentially implicates 28 U.S.C. §1291, and Federal Rules of Civil Procedure 26(b)(1) (providing for the assertion of privileges against discovery) and 24 (intervention).

STATEMENT OF THE CASE

A. Factual Background

1. Plaintiffs' complaint

Plaintiffs, a group of parents, organizations, public bodies and public officials concerned with funding for the Philadelphia School District, filed the underlying action in March 1998, against Thomas J. Ridge, Governor of Pennsylvania; Eugene Hickok, Pennsylvania's (then) Secretary of Education; Barbara Hafer, Pennsylvania's Treasurer; and James Gallagher, chair of Pennsylvania's Board of Education ("Executive Branch Officials") (Appendix E).

In their Complaint, plaintiffs assert that public primary and secondary education in Pennsylvania is a "program" subject to the "disparate impact" regulations purportedly promulgated pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d - 2000d-7, by the federal Department of Education. *See* 34 C.F.R. §100.3(b). Plaintiffs claim that funding for this "program" uses "criteria and methods that have had the foreseeable effect of subjecting [minority] students to discrimination because of their race, color, or national origin by disproportionately denying them necessary support for their education."

The Complaint is the second action initiated by most of these plaintiffs that seeks to overturn Pennsylvania's statutory system for funding public education. The federal Complaint was filed one week after the Commonwealth Court of Pennsylvania held that a state lawsuit, brought against the Pennsylvania General Assembly and various Pennsylvania Executive and Legislative officials (including

the Speaker of the House and the President *Pro Tempore* of the Senate), raised a non-justiciable political question because the Pennsylvania Constitution vested responsibility for public education solely in the Pennsylvania General Assembly.[1] *See Marrero v. Commonwealth of Pennsylvania*, 709 A.2d 956 (Pa. Cmwlth. 1998).

2. Public education in Pennsylvania

The General Assembly of Pennsylvania is constitutionally directed to "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA. CONST. art. III, §14. In a compilation of statutes known as the Public School Code, 24 P.S. §§1-101 – 27-2702, the General Assembly sets the minimum requirements for educational offerings in the Commonwealth and provides a method for funding public education. The Public School Code is amended almost annually in response to the legislature's perceptions of changing education needs.[2]

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[1] The Commonwealth Court's decision was subsequently affirmed by the Pennsylvania Supreme Court. *See Marrero v. Commonwealth of Pennsylvania*, 559 Pa. 14, 739 A.2d 110 (1999).

[2] Recently, the General Assembly amended the Public School Code to modify the subsidy distribution formulas and address problems of academically-distressed school districts. *See e.g.*, Act No. 2001-4 (which, among other things, provides for (1) business tax credits for contributions to approved, non-profit scholarship or education-improvement organizations; (2) teacher assessment; and (3) establishment of independent schools within school districts); Act No. 2000-16 (which, among other things, sets basic education and special education subsidy formulas and addresses academically-distressed school districts); Act No. 1998-46 (which, among other things, modifies the basic

The Public School Code provides school districts with local taxing authority.[3] 24 P.S. §6-672. Additional funds for public education are provided by annual appropriations to the Pennsylvania Department of Education ("PDE"). *See e.g.*, Act No. 2000-21A.[4] PDE, without the exercise of any independent discretion, distributes appropriated funds to the school districts as directed by statute. *See e.g.*, 24 P.S. §§25-2502 – 25-2503.38 (formulas for basic education subsidy payments for school years 1953-1954 through 1999-2000). The Secretary of Education is authorized to apply "on behalf of the Commonwealth" for federal "grants, appropriations, or

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education subsidy distribution formula) and Act No. 1997-22 (which provides for the establishment of charter schools).

[3] Because the School Board of the Philadelphia School District is appointed, the Philadelphia School District can only impose taxes authorized by the elected City Council of Philadelphia. *See* 24 P.S. §5-507; 351 PA. CODE §12.12-303.

[4] In 1998, the year this action was initiated, $17,987,740,000 was allocated for operation of Commonwealth government, public debt and public schools. General Appropriation Act of 1998, Act No. 1998-6A. Of this amount, $3,570,188,000 (almost 20% of the Commonwealth's budget) was allocated to the PDE for "payment of basic education funding to schools." *Id.*, section 212 (appropriations to PDE). An additional $3,486,320,000 was allocated to PDE for other educational purposes, including $677,611,000 for special education, $16,723,000 for school food services, and $13,415,000 for performance incentives. *Id.* The funding for PDE ($7,057,020,000) was the largest appropriation. The allocation of the basic education subsidy by PDE to school districts is done in accordance with a statutory formula that, while amended almost yearly, is neutral as to race, color and national origin. *See* 24 P.S. §§25-2502 to 25-2502.38 (formulas since 1953-54).

allocations" that "shall be made available for the aid of education." 24 P.S. §2811.

3. Petitioners

Petitioner Matthew J. Ryan is the Speaker of the Pennsylvania House of Representatives, one house of Pennsylvania's bicameral legislature. Petitioner Robert C. Jubelirer is the President *Pro Tempore* of the Pennsylvania Senate, the other legislative house. Since, under the Pennsylvania Constitution, the General Assembly is responsible for public education in Pennsylvania, any decision in the underlying case here, short of dismissal, will necessarily affect the General Assembly and its members, and, in particular, the duties of Speaker Ryan and Senator Jubelirer, as presiding officers.

Petitioners Jess M. Stairs and James J. Rhoades are, respectively, the chairmen of the committees on education of the Pennsylvania House and Senate. The committees on education, in most instances, give first consideration to any legislative issues related to education in the Commonwealth of Pennsylvania.

B. Proceedings Below

1. Intervention and initial proceedings

The Complaint challenges the statutory funding system established by the General Assembly. In light of their recent experience in state court as defendants in a related action by the same core group of plaintiffs, Legislative Leaders sought to intervene in this federal action for the express purpose of giving "voice to the concerns and arguments" and to "articulate the unique perspective of the

legislative branch of the Pennsylvania government." Appendix F. In their brief in support of intervention, Legislative Leaders explicitly reserved the right to assert the privilege at issue here. *See id.* at 62a. Their motion to intervene was unopposed and was granted by the District Court on June 3, 1998. *Id.* at 77a.

The District Court, ruling on motions by both defendants and intervenors, dismissed the complaint on November 19, 1998. On appeal, the Third Circuit reversed and remanded. *See Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999). After this Court denied petitions for writs of *certiorari* filed by Executive Branch Officials and Legislative Leaders, *see Ryan v. Powell*, No. 99-527, 528 U.S. 1046 (Dec. 6, 1999) and *Ridge v. Powell*, No. 99-574, 528 U.S. 1046 (Dec. 6, 1999), the District Court entered a scheduling order on January 20, 2000, setting, *inter alia*, a timeframe for discovery.

2. Discovery requests and Legislative Leaders' response

Plaintiffs directed document requests and interrogatories to Legislative Leaders, as well as to the Executive Branch Officials. *See* Appendices G and H. Specifically, Plaintiffs propounded 48 identical production requests and 20 identical interrogatories to each Legislative Leader, seeking information related to school years 1991-92 through 1999-2000.[5] Legislative Leaders responded to

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[5] In their memorandum in support of their motion to compel, Plaintiffs lumped their document requests into five, sometimes overlapping, categories: (1) "documents reflecting all Commonwealth funding for public education" (requests 10-26); (2) discovery relevant to Plaintiffs' allegation in paragraph 60 of their complaint that defendants "'had knowledge of such

the discovery,[6] objecting to both the production requests and interrogatories on the basis of legislative immunity.[7]

[racially disparate] effects each time prior to taking action which achieved these results'" (requests 7-12); (3) "documents reflecting the nature, extent and distribution of federal funding for public education in Pennsylvania" (requests 27-34); (4) documents "explaining Pennsylvania's system of school finance" and "the local funding portion of the Commonwealth's system of support for public education" (requests 1-6 and 35-37); and (5) documents "designed to begin the process of developing the proof ... that students in Philadelphia are harmed by the discrimination in public school funding" (requests 38-48). Appendix I at 138a-139a. Plaintiffs described their interrogatories as seeking information "that parallels, in great measure, the document requests, but also request specific information [] concerning the factors and information considered in the budgetary process that determined levels of state funding for education since 1991-92." *Id.* at 139a-140a.

[6] Legislative Leaders submitted a joint response to the production requests, Appendix H, and individual responses to the interrogatories. The Response and Objections of Rep. Matthew J. Ryan, which is representative of the responses submitted by the other three Legislative Leaders, appears at Appendix G.

[7] Examples of a document request and an interrogatory that seek information protected by the legislative privilege are document request 9 ("For each school year from 1991-92 through 1999-2000, all documents, including but not limited to memoranda, correspondence, proposals, alternative proposals, models, reports, or updates submitted by or on behalf of any Defendants to ... (b) any member, officer, committee, group, legislator or other person or entity in the Pennsylvania General Assembly concerning funding for public education in Pennsylvania or appropriations for any school district.") and interrogatory 13 ("For each school year from 1991-92 through 1999-2000, identify any and all communications between any defendant and ... (b) any member, officer, committee, group, legislator or other person or entity in the Pennsylvania General

a. Document production

Although objecting on grounds of legislative immunity, Legislative Leaders nevertheless reviewed relevant files and identified two classes of documents responsive to the production requests: documents that were outside the sphere of legislative activity and documents that were within the sphere of legislative activity (as that criterion is used for application of the legislative privilege, *see infra*).

Legislative Leaders produced all documents in the former category. These documents, while concerning matters related to education funding, were created for use external to the legislative process, including such items as press releases, letters to the editor, and talking points for presentations outside the General Assembly.[8]

Legislative Leaders gave Plaintiffs a description of the documents that they would not produce on the basis of the legislative privilege:

> These documents are related to legislative investigations, requests for legislative action, consideration of proposed legislation, and/or evaluation of enacted legislation related, even if indirectly, to funding for public education in

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Assembly ... concerning (i) any proposed or actual changes in any public education funding formula(s); (ii) the reason(s) for any changes to any public education funding formula(s); and (iii) the anticipated or actual effect(s) or any changes to any public education funding formula(s)"). Appendices G and H.

[8] Copies of the produced documents were part of the Appendix (pages 170a – 225a) filed with the Third Circuit.

> Pennsylvania, as defined by plaintiffs. Included within these documents are: budget requests from the Governor; Department of Education-generated proposals for BEF,[the basic education funding subsidy] special education and other funding, although none are earlier than 1996-97; House and Senate bills and bill amendments concerning education, with bill and amendment analyses by legislative staff; remarks prepared for or made by one or more of the Legislative Leaders on the floor and/or to a committee; memos seeking co-sponsors for legislation, addressing the feasibility of legislation, related to committee meetings and transmitting materials; testimony and materials presented/submitted to legislative committees; documents evaluating and proposing methods for funding public education; and reports and updates sent by PDE to members of the General Assembly relating to various grant programs.

Appendix J.

b. Interrogatories

Legislative Leaders also objected to the interrogatories, because:

> the interrogatories seek information ... that concerns matters within the sphere of legitimate legislative activity (including the investigation, consideration and enactment of legislation related to education funding) and [each Legislative Leader] is protected from having to respond to discovery regarding those matters by the legislative privilege. The legislative privilege also protects [each Legislative

> Leader] against the interference with his duties in connection with and the disruption of the legislative process, which the identification of the requested information and documents would engender.

Appendix G. Notwithstanding their objection, Legislative Leaders responded to eight of the twenty interrogatories as to which they had either no information or information falling outside the sphere of legislative activity.

With respect to the interrogatories concerning public education, each individual Legislative Leader responded that he: (1) has no document retention policy or practice for documents concerning public education (interrogatory 4); (2) maintains no electronic database of information regarding appropriations, revenues, expenditures, racial composition, poverty levels, density levels or performance levels of school districts (interrogatory 5); (3) possesses no data or documents reflecting racial or ethnic composition of school districts in Pennsylvania (interrogatory 6); (4) is aware of no calculation or comparison, outside those in documents filed in connection with this litigation, showing any funding allocations to or the total revenues of school districts with more than 50% minority enrollment or students (interrogatory 7); and (5) has submitted no documents to the federal government under Title VI of the Civil Rights Act and possesses no information concerning such documents (interrogatory 18). Appendix G.

3. Proceedings in the district court

On April 25, 2000, the District Court granted the Plaintiffs' motion to compel Legislative Leaders to respond to the remaining discovery requests ("April 25th order").

Appendix B. Legislative Leaders immediately moved for reconsideration and vacatur of the April 25th order. The District Court, by order dated May 1, 2000, denied that request. Appendix K. On May 12, 2000, Legislative Leaders asked the District Court to amend the April 25th order to include the statement prescribed by 28 U.S.C. §1292(b), which request was denied. On May 31, 2000, Legislative Leaders timely filed a Notice of Appeal to the Third Circuit. Legislative Leaders also petitioned the Third Circuit for a writ of mandamus directed to the District Court ordering it to withdraw the April 25th order.

4. Proceedings in the Third Circuit

On July 31, 2000, the Third Circuit denied Legislative Leaders' petition for writ of mandamus. Appendix L. Thereafter, the appeal in No. 00-1711 was briefed and oral argument held January 18, 2001 before Judges Roth, Barry and Shadur (United States District Court Judge for the Northern District of Illinois, sitting by designation).

On April 5, 2001, the Court dismissed the appeal. A split panel decision was released the following day. Appendix A. The panel majority dismissed the appeal for lack of jurisdiction. Judge Roth (concurring in the judgment) would have found jurisdiction and dismissed on the merits. In the respective decisions to dismiss the appeal, the judges reasoned that legislative immunity was not available as an objection to discovery by legislators who chose to intervene in the underlying action. Legislative Leaders' petition for rehearing *en banc* was denied on May 4, 2001. Appendix C.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION RAISES MATTERS OF NATIONAL IMPORTANCE

This case raises issues of great national importance pertaining to the independence of state legislators and legislatures, the integrity of the state legislative process, and the ability of legislative bodies to protect their interests in litigation which threatens to impact on the accomplishment of legislative duties. Legislators must have the ability to enter the courts when they deem it necessary to protect legal interests as legislators, yet without fear of having adversaries and courts turn their very need for defense of legislative prerogatives into a basis for intrusion into the core legislative process, as the judgment of the Third Circuit does. Unless they can thus act, state legislators risk eventually being confronted with a fait accompli in the form of a court order requiring the alteration of a statutory policy, such as has occurred in New York in the context of public education funding. *See Campaign for Fiscal Equity v. State of New York*, 719 N.Y.S.2d 475, 2001 N.Y. Misc. LEXIS 1 (N.Y. Sup. Ct., Jan. 9, 2001) (ordering legislative changes in funding).

This Court should issue its writ, not just to consider the disruption of legislative activity that is occurring by federal court order in Pennsylvania, but to ensure all state legislators and legislatures, in the course of carrying out their core legislative functions (particularly those, such as education, that are historically the function of the states and not the national government), freedom from interference by private parties engaged in civil litigation in federal courts.

A. Common Law Legislative Immunity

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized a common law legislative immunity for state legislators that protects them, absolutely, from liability for actions undertaken "in the sphere of legitimate legislative activity." *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of the common law legislative privilege and clarifying its extension to local legislators).

The federal Speech or Debate Clause, which provides immunity for federal legislators, was but a "reflection of political principles already firmly established in the States." *Tenney*, 341 U.S. at 373. The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., art. I, §6. Common law legislative immunity is co-extensive in civil matters with that provided members of Congress under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980).[9]

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[9] While this Court held in *United States v. Gillock*, 445 U.S. 360 (1980), that the common law legislative privilege did not bar the introduction of evidence concerning a state legislator's support of legislation in a federal criminal action for bribery, this Court has not extended the *Gillock* rationale to civil matters involving state legislators and assertion of the privilege. Notably, *Supreme Court of Virginia* was decided less than three months after *Gillock* and the *Tenney* decision was recently reaffirmed in *Bogan*. To the extent, moreover, that *Gillock* may be read as a limitation on the viability and scope of the common law legislative privilege, recent decisions of this Court undermine the *Gillock* Court's reasoning. *See e.g., New York v.*

Legislative immunity is intended "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). As explained in *Tenney*, "'[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensibly necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence.'" 341 U.S. at 373 (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896) at 38); *see also Bogan*, 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference"). "[T]he privilege was not born primarily of a desire to avoid private suits ... but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Helstoski*, 442 U.S. at 491 (quoting *United States v. Johnson*, 383 U.S. 169, 180-81 (1966)) (emphasis added).

Tenney and subsequent cases recognize that the privilege operates to protect the process by which legislation is developed, as opposed to the interests of the individual legislator. The *Tenney* Court's explanation of why the privilege cannot be easily defeated shows this:

> We come then to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity. ... The claim of an unworthy purpose does not destroy the

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United States, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

> privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. ... The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon the conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377 (emphasis added); *see also Fletcher v. Peck*, 6 Cranch 87, 130 (1810) (not consonant with our scheme of government for a court to inquire into the motives of legislators); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("[i]nquiries into Congressional motives or purposes are a hazardous matter").

B. Legislative Immunity Extends To Discovery

The absolute legislative immunity recognized in *Tenney* extends beyond protection from liability and the right to be dismissed as a defendant from civil suit. It also provides legislators with protection from "the burden of defending themselves when "engaged 'in the sphere of legitimate legislative activity.'" *Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). A legislator cannot be questioned concerning legislative activities. *See Gravel v. United States*, 408 U.S. 606, 616, 629 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting").

Various Courts of Appeals have recognized that the immunity operates not only as immunity from suit, but also as a privilege that protects legislators, and others performing legislative activities, from questioning in any context, including discovery. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (allowing former congressman, as non-party deponent, to refuse to answer questions concerning his activities while a legislator); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (affirming decision to quash subpoenas issued to custodian of records and congressional subcommittee staff director for information and documents in the subcommittee's possession); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (affirming decision to quash subpoenas, issued to two members of a congressional subcommittee, for documents stolen from a law firm and provided to the subcommittee); *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (noting, in providing instructions on remand, that plaintiff would have to present the case without testimony of board members who abolished plaintiff's job). This "legislative privilege" (sometimes referred to as the "testimonial strand" of the immunity), ensures that the legislative process is, for the good of the public, protected from disruption.[10]

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[10] This issue - the application of legislative immunity to prohibit certain discovery - was raised as an issue of first impression in the Court of Appeals. It was not addressed by the court, which avoided the issue by focusing instead on the status of Legislative Leaders. *See* Appendix A. Legislative Leaders' assertion of the privilege is premised on the decisions in the Fourth, Ninth and District of Columbia Circuits (and other lower courts) which draw on this Court's decisions in *Dombrowksi* and *Gravel* to interpret the privilege as protecting legislators, and anyone performing legislative functions, from questioning in a discovery context.

C. Federally-Authorized Intrusion Into The Operation Of State Government

The provision and support of public education is traditionally an area of state concern. *See e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). In Pennsylvania, it is a constitutional directive to the General Assembly. PA. CONST. art. III, §14. The complaint challenges the statutory-funding mechanism which the General Assembly has put in place, and often amends, to carry out the constitutional directive. Discovery in support of plaintiffs' claim has targeted legislative activity associated with this critical and sensitive state law.

The District Court and now the Third Circuit have authorized a sweeping intrusion into the internal operations of the Pennsylvania General Assembly. The orders of these lower courts pay no heed to the function of the privilege as a bulwark of separation of powers.

The General Assembly of Pennsylvania is always facing education issues. To fulfill the directive of the Pennsylvania Constitution that the General Assembly provide a system of public education to serve the needs of the Commonwealth, each chamber has a standing Education Committee. The Education Committees are charged with investigating education issues, proposing and reviewing education legislation. The Committees frequently conduct public hearings across the Commonwealth on education issues of concern to the Commonwealth's citizens, individuals and businesses. The Chairmen of the Education Committees must not be disrupted in their performance of these core legislative activities by discovery requests for documents and information related to the conduct of these activities, merely (and ironically) because they intervened in

federal litigation to protect their legal interest in carrying out those duties.

The intrusion, moreover, is not limited to the legislators participating in this matter. On the strength of the orders of the lower courts, plaintiffs are expected to expand discovery to target other legislators or staff persons (current or past) involved in the formulation and passage of legislation relevant to public school funding. The potential for disruption to the Pennsylvania General Assembly is enormous. Through their complaint and discovery requests, plaintiffs will have obtained a degree of access to the General Assembly possessed by no other citizen. This result perverts the legislative process and the principles of democratic government. *See Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 503 (1975) ("[a] private civil action may [] be used to delay and disrupt the legislative function").

The impact reaches far beyond this case. It is a prescription for like intrusion into "legislative activity" at every level of government of each of the fifty states, as well as the District of Columbia, Puerto Rico, the United States Virgin Islands and other governments operating under the auspices of the United States Constitution. This Court should clarify that the legislative immunity extends to discovery, regardless of the status of the assertor with respect to the underlying action, so as to prevent such intrusion.

II. THE THIRD CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS, INCLUDING THE THIRD CIRCUIT, WHICH RECOGNIZE THAT AN ORDER DENYING IMMUNITY IS A COLLATERAL ORDER SUBJECT TO IMMEDIATE APPEAL

The collateral order doctrine, enunciated by this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), provides an exception to the general rule that orders which are not final under 28 U.S.C. §1291 will not support appellate jurisdiction. It permits appeal of "those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863, 867 (1994) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)). Immediate appeal for this "small class" of orders is appropriate because the "rights asserted [are] too important to be denied review." *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (citing *Cohen*, 337 U.S. at 546).

This Court and all of the Courts of Appeal, including the Third Circuit, recognize that orders denying legislative or other forms of immunity asserted by government officials are appealable collateral orders.[11] *See e.g. Helstoski v. Meanor*, 442 U.S. 500 (1979) (claim of absolute immunity

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[11] The Third Circuit also entertains appeals from discovery orders qualifying as collateral orders. *See e.g., In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997) (asserting jurisdiction to review order denying claim of attorney-client privilege); *Bacher v. Allstate Ins. Co.*, 211 F.3d 52 (3d Cir. 2000) (same).

under the Speech or Debate Clause by Congressman); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (claim of absolute immunity by president); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (claim of qualified immunity by former attorney general); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240 (3d Cir. 1998) (claim of absolute legislative privilege by state supreme court justices).[12] Each of these immunities have, as their essence, the entitlement not only not to stand trial and but also to avoid the burdens of such pretrial matters as discovery. *See*

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[12] *See also Agromayor v. Colberg*, 738 F.2d 55 (1st Cir. 1984) (order denying state legislator's absolute immunity defense immediately appealable); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70 (2d Cir. 1992) (referencing collateral order doctrine and affirming denial of legislative immunity defense on the merits); *Bines v. Kulaylat*, 215 F.3d 381, 384 (3d Cir. 2000) ("There is no question that orders denying absolute immunity are reviewable on interlocutory appeal."); *Front Royal & Warren County Indus. Park v. Town of Front Royal*, 865 F.2d 77 (4th Cir. 1989) (order striking town's absolute immunity defense immediately appealable); *Liberty Mutual Ins. Co. v. Louisiana Dept. of Ins.*, 62 F.3d 115 (5th Cir. 1995) (discovery order that implicitly denied state rate commissioner's claim of legislative immunity immediately appealable); *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999) (order denying state prosecutors' assertion of absolute immunity immediately appealable); *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir. 1988) (order denying municipal attorney's claim of absolute immunity immediately appealable); *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992) (order denying absolute immunity to alderman immediately appealable); *Chateaubriad v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) (order denying state legislator's claim of legislative immunity immediately appealable); *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) (order denying absolute immunity to deputy sheriff immediately appealable); *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 1185 (11th Cir. 1993) (order denying absolute immunity to county commissioners immediately appealable).

Behrens, 516 U.S. at 308; *see also Lauro Lines S.L.R. v. Chasser*, 490 U.S. 495, 499-500 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 523-25 (1988).

In *Helstoski v. Meanor*, this Court held that an order denying Speech or Debate immunity would be directly and immediately appealable to the court of appeals. Using its rationale from *Abney v. United States*, 431 U.S. 651 (1977) (order denying a claim of double jeopardy was an appealable collateral order), this Court explained in *Helstoski* that the important right afforded by the Speech or Debate Clause would be "significantly undermined" if appellate review were postponed. 442 U.S. at 507. As "the Speech or Debate Clause was designed to protect Congressmen, 'not only from the consequences of litigation's results but also from the burden of defending themselves,' ... if a Member [of the legislature] 'is to avoid exposure to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his ... challenge to the indictment must be reviewable before ... exposure [to trial] occurs.'" 442 U.S. at 508 (citing *Dombrowski*, 387 U.S. at 85 and *Abney*, 431 U.S. at 662) (brackets and ellipsis in the original).

Legislative Leaders asserted legislative immunity as an objection in response to the discovery requests. The Third Circuit erred once by not recognizing the nature of the privilege asserted, and twice, by conflating its analysis of jurisdiction with the merits of the assertion. The merits of the immunity claim are irrelevant because, as this Court has explained, whether an order qualifies as a collateral order "must be determined by focusing upon the *category of order appealed from*; ... [a]ppeal rights cannot depend on the facts of a particular case." *Behrens*, 516 U.S. at 311 (emphasis added). *See also Cohen*, 377 U.S. at 546 (referring to "small

class" of orders). It is also axiomatic that a federal court must determine and find jurisdiction before addressing the merits. *See e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (rejecting as contrary to fundamental principles of separation of powers the growing use of "hypothetical jurisdiction" under which courts of appeals would first address and dismiss on the merits in order to avoid a difficult question of jurisdiction).

III. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH BASIC LEGAL PRINCIPLES, PRECEDENT OF THIS COURT, AND DECISIONS OF OTHER CIRCUITS, INCLUDING THE THIRD CIRCUIT, AND PRESENTS AN IMPORTANT FEDERAL QUESTION

The Third Circuit's erroneous conclusion that Legislative Leaders' intervention resulted in a waiver of their right to assert legislative immunity evidences a misunderstanding of legislative immunity, of intervention, and of the realities of litigation that targets decision-making by a state legislature.[13] Because it interpreted the immunity to protect legislators from the disruption only of suit, the Third Circuit reasoned that Legislative Leaders must have renounced the privilege by intervening. As explained above, however, legislative immunity is more than a privilege to avoid suit; it is a privilege not to be questioned about legislative activities.

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[13] The majority of the Third Circuit panel, by refusing to apply the collateral order doctrine because Legislative Leaders had not raised a "traditionally recognized privilege," implied that the privilege had been waived by the act of intervention. The concurring judge explicitly found such a waiver.

A. Waiver of Legislative Immunity

The Third Circuit's refusal to recognize legislative immunity runs afoul of this Court's decision in *United States v. Helstoski*, 442 U.S. 477 (1979). In *Helstoski*, assuming that even if a waiver of Speech or Debate immunity could ever occur, this Court cautioned that such waiver of this critical right could be found "only after explicit and unequivocal renunciation of the protection." *Id.* at 491 (emphasis added). The stringent test set forth by this Court in *Helstoski* respects the status of the privilege as a bulwark of separation of powers.

No such 'explicit and unequivocal' renunciation of the privilege's protection occurred here. Legislative Leaders intervened in this action for the express purpose of protecting their rights, a bundle which includes legislative immunity. Their position on immunity is entirely consistent with their desire to give "voice to the concerns and arguments" and to "articulate the unique perspective of the legislative branch of the Pennsylvania government."[14] The immunity and the legislative activity it protects is of the utmost concern to these leaders of the Pennsylvania General Assembly.

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[14] The difficulty a legislature faces in meeting disparate needs, and the deference it should receive from the courts as to the performance of its policy choices, are examples of the issues that intervenors would want the district court to consider. These are public policy principles that do not require discovery into the workings of the legislature by litigants but that are often overlooked by non-legislative parties, even in the executive branch of government.

B. An Intervenor Becomes A Party To The Litigation

The basic principle offered by the Third Circuit in support of its decision - that a privilege otherwise assertable against discovery can be waived by the act of intervention - is flawed, and threatens to impact far beyond the present matter.

It is a tenet of civil practice and procedure that once intervention is granted, the intervenor becomes a full participant in the lawsuit and is treated as if it were an original party.[15] *See e.g., Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) (stating this general rule); Wright, Miller & Kane, 7C FEDERAL PRACTICE & PROCEDURE 2d §1920 (1986 & 2000 Supp.). The rights of the intervening party, unless subject to restrictions crafted by the district court at the time of intervention, are entitled to as much judicial protection as the rights of the original parties.[16]

The inquiry to determine whether the legislative privilege applies - i.e., whether it is being asserted in connection with activities undertaken within the "sphere of legitimate legislative activity" - focuses on the activity

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[15] The present situation is to be distinguished from one in which a party intervenes for the express purpose of protecting a privilege. In those situations, the privilege is typically the legal interest that supports intervention under Fed. R. Civ. P. 24. Here, Legislative Leaders had legal interests that included, but were not limited to, the legislative privilege.

[16] The only generally-recognized limitation on an intervenor's ability to protect its rights is a prohibition against questioning venue.

giving rise to the protected information, not on the status of the assertor. It matters not whether the assertor is a plaintiff, defendant, intervenor, non-party or even expert witness. What matters is whether the activity in which the assertor was, or is, engaged is a "core legislative activity." *See e.g., Gravel*, 408 U.S. 606 (legislative privilege barred testimony of non-party senate aide concerning his contacts with Senators); *Campaign for Fiscal Equity, Inc. v. State of New York*, 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (App. Div. 1999) (legislative immunity protected expert witness from questioning related to contacts with legislators and legislative aides during formulation of computer models for state funding of public schools).

With its focus on the activity that generated the information alleged to be protected, the legislative privilege is akin to other privileges routinely asserted by someone other than an original party to the action. Waiver of a privilege is typically a function of affirmatively putting the privilege at issue, such as where a client sues his or her prior attorney. Courts have not held, and the Third Circuit was unable to cite any supporting case law, that the act of intervening is alone sufficient to waive a privilege.[17]

If this theory of waiver is accepted, there would be no principled way for it not to be applied to federal

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[17] In an analogous context, courts have held that the federal government, by instituting suit as a plaintiff, does not automatically waive its right to assert the work-product and deliberative-process privileges. *See e.g., Zenith Radio Corp. v. United States*, 764 F.2d 1577, 1580 (Fed. Cir. 1985) ("These privileges involve subtle and sensitive questions and ordinarily should not be breached without a more penetrating analysis than the automatic waiver rule involves.").

officials who might voluntarily choose to intervene in this or a similar case. For example, if the United States Secretary of Education were to voluntarily intervene, he would do so at the risk of being deemed to have waived the deliberative process privilege and other available governmental privileges.

C. Importance To State Government

There is a dangerous and misguided perception at work in the underlying proceedings. The Third Circuit's reasoning shows a belief that Legislative Leaders' intervention (and their assertion of legislative immunity in response to discovery) was for the sole purpose of impeding the proceedings. However, to premise waiver of legislative immunity on voluntary intervention based on this misguided perception fails to account for Legislative Leaders' legitimate and legal interest in the subject matter of the suit and their broader interest in protecting the legislative process.

The Third Circuit's reasoning would result in relegating the true target of this civil complaint to the sidelines. While individual officials in the executive branch of state government have been sued, the legal interests of the legislative branch are far more directly involved and may not be as vigorously protected by the executive branch. With respect to the funding system for public education at issue here, the duties of the executive branch are statutory and ones over which they have little to no discretion. With respect to the bulk of the Commonwealth-treasury funds designated to the support of public school education, the executive branch has only the ministerial task of distributing the funding according to statutory formula.

The General Assembly, on the other hand, is directed by the Pennsylvania Constitution to maintain a system of public education to serve the needs of the Commonwealth, an activity that implicates a myriad of policy concerns and budgetary decisions. The Third Circuit's reasoning on waiver is short-sighted when considered against the realities of the situation. It forces legislators to risk either a fait accompli in the form of a court order requiring action that can only be accomplished by legislation (such as occurred in New York in *Campaign for Fiscal Equity v. State of New York, supra*) if they do not intervene or disruption of the core legislative process by multiple discovery requests if they do.

Neither Legislative Leaders, nor the citizens of Pennsylvania, should be penalized for the Legislative Leaders' vigorous defense of this case given the constitutional obligation of the General Assembly of Pennsylvania to fashion a system of public education to meet the needs of the Commonwealth. This obligation does not exist in a vacuum but rather must be balanced with all the other obligations and responsibilities of the legislative branch of a state government to its citizens. Just as they defended themselves and their institution in the *Marrero* case in state court, where the same core plaintiffs also challenged the statutory system for funding public education, Legislative Leaders chose to participate in the underlying suit because of the grave consequences any decision other than dismissal would have on the General Assembly and its members.

The protection of legislative activities from discovery by the assertion of legislative immunity is not inconsistent with participation in this lawsuit. The federal

judiciary should be chary of permitting any deterrent to the uninhibited discharge of core legislative duties by state legislators.

CONCLUSION

For the reasons developed above, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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